

D.T.E. 01-37-A

Rulemaking by the Department of Telecommunications and Energy on its own motion to promulgate 220 C.M.R. §§ 151.00 et seq.: Rail Fixed Guideway System of the Massachusetts Bay Transportation Authority.

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ORDER ADOPTING FINAL REGULATIONS

## I. INTRODUCTION

On April 19, 2001, the Department of Telecommunications and Energy (“Department”) adopted as an emergency regulation, 220 C.M.R. §§ 151.00 et seq.: Rail Fixed Guideway System: Safety System Program Standard.<sup>1</sup> The Department originally promulgated 220 C.M.R. §§ 151.08 and 151.09 in November 1998.<sup>2</sup> These two sections were inadvertently omitted from final publication in the Massachusetts Register in a subsequent Department rulemaking revising 220 C.M.R. §§ 151.00 et seq.<sup>3</sup> This rulemaking is intended to reinstate sections 151.08 and 151.09.

Pursuant to G.L. c. 30A, § 2, an Order adopting the emergency regulations as final must be issued before their expiration,<sup>4</sup> and after an opportunity for public comment. In the initial Order commencing this rulemaking, the Department solicited comments on the reinstatement of sections 151.08 and 151.09 during a comment period from April 26, 2001 to May 29, 2001. No comments were received, nor did any members of the public comment at a hearing held on May 24, 2001. With this Order, the Department adopts the emergency regulations as permanent.

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<sup>1</sup> Rulemaking by the Department of Telecommunications and Energy on its own motion to promulgate 220 C.M.R. §§151.00 et seq.: Rail Fixed Guideway System of the Massachusetts Bay Transportation Authority, D.T.E. 01-37 (2001).

<sup>2</sup> Investigation by the Department of Telecommunications and Energy on its own motion to promulgate 220 C.M.R. § 151.08: Rail Fixed Guideway System: Track Inspection and 220 C.M.R. § 151.09: Rail Fixed Guideway System: Track Maintenance, for the Massachusetts Bay Transportation Authority, D.T.E. 98-75 (1998).

<sup>3</sup> Investigation by the Department of Telecommunications and Energy on its own motion to amend 220 C.M.R. §§ 151.00 et seq.: Rail Fixed Guideway System of the Massachusetts Bay Transportation Authority, D.T.E. 00-38 (2001).

<sup>4</sup> Emergency regulations remain in effect for three months. 220 C.M.R. § 2.05(4).

## II. FINAL REGULATIONS

The Commonwealth of Massachusetts has one rail fixed guideway system, operated by the Massachusetts Bay Transportation Authority (“MBTA”). The Department exercises oversight of the safety of equipment and operations of the MBTA pursuant to G.L. c. 161A, § 3(i).<sup>5</sup> In the discharge of this responsibility and in compliance with Federal Transit Administration (“FTA”) requirements, the Department promulgated 220 C.M.R. §§ 151.00 et seq., the System Safety Program Standard (“SSPS”), consisting of regulations for hazardous conditions safety, personal security oversight, and track inspection and maintenance. See D.P.U. 96-116 (1997), D.T.E. 98-11 (1998), D.T.E. 98-75. The SSPS establishes the criteria the MBTA<sup>6</sup> uses to create a System Safety Program Plan (“SSPP”).

In 1998, the Department originally promulgated 220 C.M.R. § 151.08, Track Inspection, and 220 C.M.R. § 151.09, Track Maintenance. See D.T.E. 98-75. The new regulations were published with the existing sections as 220 C.M.R. §§ 151.00 et seq. in Massachusetts Register No. 857 on November 27, 1998. In March 2000, the FTA audited the Department’s SSPP and directed the Department to make certain changes to comply with the requirements of 49 C.F.R. Part 659.7. The Department opened a rulemaking proceeding to amend 220 C.M.R. §§ 151.00 et seq. An Order

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<sup>5</sup> The Intermodal Surface Transportation Efficiency Act of 1991 (“ISTEA”), Pub. L. No. 102-240, codified at 49 U.S.C. 5330 (1994), through the promulgation of Federal Transit Administration regulations at 40 C.F.R. 659: Rail Fixed Guideway Systems: State Safety Oversight, requires states that operate a rail fixed guideway system that is not regulated by the Federal Railroad Administration (“FRA”) to designate a state agency to be responsible for overseeing the rail fixed guideway system’s safety plan.

<sup>6</sup> 220 C.M.R. §§ 150.00 et seq., Railroad Safety Regulations, is applicable to each railroad company operating within the Commonwealth. 220 C.M.R. §§ 151.00 et seq. contains regulations specifically applicable to the MBTA.

promulgating the amended regulations was issued, and the amended regulations were published in Massachusetts Register No. 903 on September 1, 2000. See D.T.E. 00-38 (2000).

As an oversight, the amended regulations, as published, did not contain sections 151.08 and 151.09. To correct this oversight, on April 19, 2001, the Department reinstated sections 151.08 and 151.09 as emergency regulations and proceeded with this rulemaking to make permanent 220 C.M.R. §§ 151.00 et seq., including sections 151.08 and 151.09. The text of the proposed regulations is identical to the text of 220 C.M.R. §§ 151.08 and 151.09, as originally promulgated in D.T.E. 98-75, and adopted as emergency regulations in D.T.E. 01-37. The Department does not propose in this rulemaking to amend or revise 220 C.M.R. §§ 151.00 et seq., other than to correct an earlier oversight and to reinstate sections 151.08 and 151.09. The Department received no comment to cause it to modify the emergency regulation before adopting it as final.

When they were originally promulgated in 1998, sections 151.08 and 151.09 were found to be in the public interest, as they provide appropriate standards to implement the safety oversight mandated by FTA regulations at 40 C.F.R. 659. D.T.E. 98-75, at 3. Sections 151.08 and 151.09 have not been revised or amended and continue to be in the public interest. The reinstatement of the rules governing the fixed rail guideway system is necessary for the public health, safety, and general welfare. Accordingly the Department now issues 220 C.M.R. §§ 151.00 et seq. as final regulations. Review of these regulations may be had by a petition for declaratory relief in accordance with G.L. c. 30A, § 7, and c. 231A, § 2. Limitations on the scope of review are set forth in Thomas v. Commissioner of

Division of Medical Assistance, 425 Mass 438, 746 (1997). See also G.L. c. 231A, § 9, on construction of the review remedy.

IV. ORDER

Accordingly, after notice, hearing and consideration, it is:

ORDERED: That the revised regulations designated as 220 C.M.R. §§ 151.00 et seq., and entitled “Rail Fixed Guideway System: Safety System Program Standard,” attached hereto, are hereby ADOPTED, effective upon their filing with the Secretary of the Commonwealth as emergency regulations on April 19, 2001; and it is

FURTHER ORDERED: that the Secretary to the Department shall file with the Secretary of the Commonwealth a Notice of Compliance with the emergency regulations designated 220 CMR §§ 151.00 et seq. and published in the Massachusetts Register Number 925 on July 6, 2001.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr. Commissioner

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Deirdre K. Manning, Commissioner